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Warrantless Search of Arrestee's Property Inaccessible to Him at Time of Search Not Valid as Incident to Lawful Arrest

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quately addressed by section 7-204(2) of the UCC.¹⁹⁶ Accordingly, it would appear inequitable to hold a bailee liable for the entire value of the stored property especially since he may never have been aware of the actual value of the goods. It is submitted, therefore, that a more evenhanded approach towards remedying potentially fraudulent activity in bailment situations is warranted. One possible approach would be to limit statutorily the amount of damages recoverable in either a negligence or conversion action to a value declared at the commencement of the bailment.

Peter N. Cubita

Warrantless search of arrestee's property inaccessible to him at time of search not valid as incident to lawful arrest

The fourth amendment to the Constitution protects an indi-

ney 1978). Two Court of Appeals decisions vividly illustrate the judicial hostility toward attempted limitations of liability. In *Willard Van Dyke Prods., Inc. v. Eastman Kodak Co.*, 12 N.Y.2d 301, 189 N.E.2d 693, 239 N.Y.S.2d 337 (1963), the Court addressed the issue of whether a liability limiting provision accompanying film sold by Eastman Kodak was sufficiently unequivocal to effectively limit the company's liability for negligence. *Id.* at 302, 189 N.E.2d at 693-94, 239 N.Y.S.2d at 338. The limitation of liability provided:

This film will be replaced if defective in manufacture, labeling, or packaging, or if damaged or lost by us or any subsidiary company. Except for such replacement, the sale or subsequent handling of this film for any purpose is without warranty or other liability of any kind. Since dyes used with color films, like other dyes, may, in time, change, this film will not be replaced for, or otherwise warranted against, any change in color.

Id. at 303, 189 N.E.2d at 694, 239 N.Y.S.2d at 339. Although the plaintiff concededly had notice of the provision, the *Willard Van Dyke* Court held that the agreement to limit liability for negligence was not expressed in sufficiently "clear and unequivocal terms." *Id.* at 305, 189 N.E.2d at 695, 239 N.Y.S.2d at 340. Alternatively, the Court concluded that the plaintiff reasonably could have believed that the provision was inapplicable to the processing of the film because the notice also stated that the cost of processing was not included in the price of the film. *Id.* Similarly, in *Gross v. Sweet*, the Court held that an agreement to "waive any and all claims" against several defendants did not effectively limit liability for negligence because the intention of the parties was not expressed in "unmistakable language." 49 N.Y.2d 102, 107-09, 400 N.E.2d 306, 309-10, 424 N.Y.S.2d 365, 368-69; *cf.* *Klar v. H. & M. Parcel Room, Inc.*, 270 App. Div. 538, 541, 61 N.Y.S.2d 285, 288 (1st Dep't 1946), *aff'd*, 296 N.Y. 1044, 73 N.E.2d 912 (1947) (bailor must have reasonable notice of and assent to terms of exculpatory clause).

¹⁹⁶ Section 7-204 of the UCC requires that warehousemen who attempt to limit liability for negligence must, on the written request of the bailor, afford the bailor the opportunity to increase the level of liability in exchange for the payment of a higher storage fee. N.Y.U.C.C. § 7-204(2) (McKinney 1964).

vidual from unreasonable searches and seizures.¹⁹⁷ Although generally, warrantless searches have been found to be presumptively unreasonable per se,¹⁹⁸ certain limited exceptions exist whereby a search conducted in the absence of a warrant may be sustained as reasonable.¹⁹⁹ One such exception permits the search of an arrestee's person and the area "within his immediate control" as "incident to a lawful arrest."²⁰⁰ Notably, however, courts applying the

¹⁹⁷ The fourth amendment to the Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV. The fourth amendment is applicable to the states through the fourteenth amendment. *Terry v. Ohio*, 392 U.S. 1, 8 (1968); *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

The central focus of the amendment is to place a disinterested magistrate between a possibly "overzealous" officer and the individual searched in order to guard against unreasonable invasions of privacy interests. *Johnson v. United States*, 333 U.S. 10, 13-14 (1948); see *United States v. Lefkowitz*, 285 U.S. 452, 464 (1932); Schrock & Welsh, *Reconsidering the Constitutional Common Law*, 91 HARV. L. REV. 1117, 1148 (1978). The fourth amendment, however, does not confer upon the individual a general right of privacy. *Katz v. United States*, 389 U.S. 347, 350-51 (1967); see *United States v. Chadwick*, 433 U.S. 1, 11 n.6 (1977).

¹⁹⁸ *Katz v. United States*, 389 U.S. 347, 357 (1967); *People v. Hodge*, 44 N.Y.2d 553, 557, 378 N.E.2d 99, 101, 406 N.Y.S.2d 736, 738 (1978) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973)); see *Chambers v. Maroney*, 399 U.S. 42, 51 (1970). Generally, evidence obtained from an unlawful search is inadmissible. *Mapp v. Ohio*, 367 U.S. 643 (1961); see W. RICHARDSON, EVIDENCE § 560, at 561-62 (10th ed. J. Prince 1973).

¹⁹⁹ *United States v. Chadwick*, 433 U.S. 1, 11 (1977); *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971); *Katz v. United States*, 389 U.S. 347, 357 & n.19 (1967); see, e.g., *Chimel v. California*, 395 U.S. 752 (1969) (search incident to lawful arrest); *Warden v. Hayden*, 387 U.S. 294 (1967) (search performed in "hot pursuit"); *Cooper v. California*, 386 U.S. 58 (1967) (search of impounded property subject to forfeiture); *McDonald v. United States*, 335 U.S. 451 (1948) (search where exigent circumstances exist); *Carroll v. United States*, 267 U.S. 132 (1925) (search of mobile automobile if probable cause for search was present). See generally Haddad, *Well-Delineated Exceptions, Claims of Sham, and Fourfold Probable Cause*, 68 J. CRIM. L. & CRIMINOLOGY 198, 199-200 (1977).

The burden is on the state to show that the warrantless search was justified by exigent circumstances and, therefore, was reasonable. *Vale v. Louisiana*, 399 U.S. 30, 34 (1970); *People v. Clements*, 37 N.Y.2d 675, 686, 339 N.E.2d 170, 177, 376 N.Y.S.2d 480, 490 (1975) (Wachtler, J., dissenting), cert. denied, 425 U.S. 911 (1976).

²⁰⁰ *Chimel v. California*, 395 U.S. 752, 763 (1969). The search incident to a lawful arrest is an early exception to the warrant requirement. In *Weeks v. United States*, 232 U.S. 383 (1914), the Supreme Court, in dictum, observed that English and American Law has always recognized that it is lawful to conduct a search of the accused's person when lawfully arrested. *Id.* at 392. The justification for a warrantless search incident to an arrest is to seize weapons that could be used to effect an escape or assault an officer, and to thwart the destruction of ephemeral evidence. *Chimel v. California*, 395 U.S. 752, 763 (1969); *Preston v. United States*, 376 U.S. 364, 367 (1964); Haddad, *supra* note 199, at 203; see *Arkansas v.*

incident to arrest exception have differed in their interpretation of what constitutes the arrestee's area of immediate control.²⁰¹ Recently, in *People v. Belton*,²⁰² the Court of Appeals held that the warrantless search of a jacket not immediately accessible to an arrestee at the time of the search was unreasonable and, conse-

Sanders, 442 U.S. 753, 759 (1979); *United States v. Chadwick*, 433 U.S. 1, 14 (1977). New York has recognized the search incident to arrest exception. *E.g.*, *People v. Loria*, 10 N.Y.2d 368, 373, 179 N.E.2d 478, 482, 223 N.Y.S.2d 462, 467 (1961).

It has been held that to be valid, a search incident to a lawful arrest must be substantially contemporaneous with that arrest. *See United States v. Chadwick*, 433 U.S. 1, 15 (1977); *Shipley v. California*, 395 U.S. 818, 819 (1969); *Preston v. United States*, 376 U.S. 364, 367 (1964); *Stoner v. California*, 376 U.S. 483, 486 (1964); *Agnello v. United States*, 269 U.S. 20, 30-31 (1925). In *Preston*, the Supreme Court observed that the justifications for allowing a search incident to arrest are "absent where a search is remote in time or place from the arrest." 376 U.S. at 367. *But see United States v. Edwards*, 415 U.S. 800 (1974). The *Edwards* Court upheld the warrantless search of the defendant's clothing 10 hours after the arrest as incident to the arrest. *Id.* at 801-02. Disregarding that the "administrative mechanics" of the arrest were completed and that ample time was available to procure a warrant, the Court asserted that if the search was reasonable at the moment of arrest, then it was also reasonable a "substantial" time later. *Id.* at 804, 807; *see Abel v. United States*, 362 U.S. 217, 239 (1960); Note, *Warrantless Search Incident To Arrest: New Standards for Delayed Searches*, 46 U. COLO. L. REV. 587, 593 (1975). Subsequent to its decision in *Edwards*, however, the Court reaffirmed the requirement set forth in *Stoner* and *Preston* that the search be substantially contemporaneous with the arrest. *United States v. Chadwick*, 433 U.S. 1, 15 (1977); *see United States v. Ross*, No. 79-1624, slip op. at 17 (D.C. Cir. Apr. 17, 1980).

The New York Court of Appeals also has observed the need for the search to be simultaneous with the arrest. *E.g.*, *People v. Evans*, 43 N.Y.2d 160, 166, 371 N.E.2d 528, 531, 400 N.Y.S.2d 810, 813 (1977); *People v. Fitzpatrick*, 32 N.Y.2d 499, 508, 300 N.E.2d 139, 143, 346 N.Y.S.2d 793, 799 (1973); *People v. Lewis*, 26 N.Y.2d 547, 551, 260 N.E.2d 538, 540, 311 N.Y.S.2d 905, 908 (1970). The *Evans* Court went so far as to remark that "the search and arrest must constitute a single *res gestae*." 43 N.Y.2d at 166, 371 N.E.2d at 531, 400 N.Y.S.2d at 813.

²⁰¹ The permissible area of search has been alternately extended and curtailed. Compare *United States v. Rabinowitz*, 339 U.S. 56, 66 (1950), *overruled*, *Chimel v. California*, 395 U.S. 752, 762-68 (1969) with *Trupiano v. United States*, 334 U.S. 699, 705 (1948). In *Rabinowitz*, the search of an entire room where the arrest occurred was upheld, since the Supreme Court declared that the proper test was whether the search was reasonable, and not whether it was reasonable to obtain a search warrant. 339 U.S. at 66. *Chimel*, however, overruled *Rabinowitz*, declaring that no justification existed for the search to go beyond that area where the arrestee could "obtain weapons or evidentiary items." 395 U.S. at 766. Although *Chimel* was addressed to the warrantless search of an entire house, it has been applied to searches of personal luggage in automobiles. *Arkansas v. Sanders*, 442 U.S. 753, 764-65 n.13 (1979); *see 2 W. LAFAVE, SEARCH AND SEIZURE* § 7.1, at 499 (1978); Note, *Criminal Law: The Effect of Chimel v. California on Automobile Search and Seizure*, 23 OKLA. L. REV. 447, 450-52 (1970); Comment, *Chimel v. California: A Potential Roadblock to Vehicle Searches*, 17 U.C.L.A. L. REV. 626, 636-40 (1970).

²⁰² 50 N.Y.2d 447, 407 N.E.2d 420, 429 N.Y.S.2d 574 (1980), *rev'g*, 68 App. Div. 2d 198, 416 N.Y.S.2d 922 (4th Dep't 1979).

quently, the evidence obtained therefrom must be suppressed.²⁰³

In *Belton*, the defendant was a passenger in a car stopped by a state trooper for a traffic violation.²⁰⁴ While questioning the driver, the officer detected the odor of marijuana emanating from the car and noticed an envelope on the floor of the type frequently used in packaging the drug for sale.²⁰⁵ After ordering all four occupants from the car, frisking them,²⁰⁶ and inspecting the envelope, the trooper ascertained that the envelope contained marijuana.²⁰⁷ The officer arrested the occupants, who were still outside the car, and then searched the pockets of the jackets on the back seat.²⁰⁸ In one of them, he found a quantity of cocaine and the defendant's identification.²⁰⁹ At his subsequent trial for possession of a controlled substance, the defendant moved to suppress the evidence obtained during the search.²¹⁰ The Ontario County Court denied the motion,²¹¹ and the Appellate Division, Fourth Department, affirmed.²¹²

On appeal, the Court of Appeals reversed, holding that the warrantless search of the jacket was not an incident to the arrest and, hence, could not be upheld as reasonable.²¹³ Chief Judge Cooke, writing for the majority,²¹⁴ initially acknowledged that upon arrest, the danger exists that the subject may attempt to destroy evidence of a crime or obtain a weapon.²¹⁵ Hence, the Court continued, it is both reasonable and necessary that a speedy warrantless search "of the arrestee's person and the area within his immediate control" be conducted.²¹⁶ Nevertheless, stated the ma-

²⁰³ 50 N.Y.2d at 449, 407 N.E.2d at 421, 429 N.Y.S.2d at 575.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ Unlike a search, a frisk can be performed without arresting the suspect. *See, e.g., People v. Bowles*, 29 App. Div. 2d 996, 996, 289 N.Y.S.2d 526, 528 (3d Dep't 1968), *cert. denied*, 396 U.S. 865 (1969).

²⁰⁷ 50 N.Y.2d at 449, 407 N.E.2d at 421, 429 N.Y.S.2d at 575.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *See id.* *See generally* CPL §§ 710.20, .40, .70 (1971 & Supp. 1979-1980); W. RICHARDSON, *supra* note 198, § 561(a).

²¹¹ *See* 68 App. Div. 2d at 199, 416 N.Y.S.2d at 923-24.

²¹² *Id.* at 201, 416 N.Y.S.2d at 925.

²¹³ 50 N.Y.2d at 449, 407 N.E.2d at 421, 429 N.Y.S.2d at 575.

²¹⁴ Chief Judge Cooke was joined by Judges Jones, Wachtler, Fuchsberg, and Meyer. Judge Gabrielli filed a dissenting opinion in which Judge Jasen joined.

²¹⁵ 50 N.Y.2d at 450, 407 N.E.2d at 422, 429 N.Y.S.2d at 576; *see* note 200 *supra*.

²¹⁶ 50 N.Y.2d at 450, 407 N.E.2d at 422, 429 N.Y.S.2d at 576 (citing *Chimel v. California*, 395 U.S. 752, 763 (1969)).

jority, the arrestee's privacy interest in possessions not within his immediate grasp is not forfeited once he is "effectively neutralized" or the "object is within the exclusive control of the police."²¹⁷ Therefore, any search extended into these areas is unlawful.²¹⁸ The "critical inquiry," the Court announced, is whether the defendant had access to the property at the time of search.²¹⁹ Noting that in the case before it, the defendant's jacket was "within the exclusive custody and control of the police," the occupants of the car were "safely away from the vehicle," and their transportation to the police station was "imminent," the Court concluded that the exigencies necessary to justify the warrantless search were absent.²²⁰ Thus, it was held that evidence obtained from the illegal search should be suppressed.²²¹

Dissenting, Judge Gabrielli objected to the majority's disregard for the findings of fact made by the lower courts.²²² It had been determined below and amply supported in the record, the dissent noted, that, at the time of the search, the jackets were accessible to the defendants and not yet within the exclusive control of the police.²²³ Hence, according to Judge Gabrielli, the conclusion was inescapable that, having been incident to a lawful arrest, the search was reasonable.²²⁴

The holding in *Belton*, that items not immediately accessible to an arrestee may not legally be subjected to a warrantless search, constitutes a marked departure from the position previously adhered to by the Court of Appeals. *Belton* expressly overruled earlier cases of the Court which had upheld warrantless searches of

²¹⁷ 50 N.Y.2d at 451, 407 N.E.2d at 422, 429 N.Y.S.2d at 576; see *Arkansas v. Sanders*, 442 U.S. 753, 766 (1979); *United States v. Chadwick*, 433 U.S. 1, 15 (1977).

²¹⁸ 50 N.Y.2d at 451, 407 N.E.2d at 422, 429 N.Y.S.2d at 576. The Court observed that although the arrest may establish the authority for the search, "it does not transform the initial predicate into carte blanche justification to rummage through all articles" associated with the arrestee. *Id.*

²¹⁹ *Id.*

²²⁰ *Id.* at 452, 407 N.E.2d at 423, 429 N.Y.S.2d at 577.

²²¹ *Id.*

²²² *Id.* at 454, 407 N.E.2d at 424, 429 N.Y.S.2d at 578 (Gabrielli, J., dissenting).

²²³ *Id.* (Gabrielli, J., dissenting). The dissent argued that the present case is "illustrative of the type of situation in which a warrantless search is most appropriate." *Id.* (Gabrielli, J., dissenting). Emphasizing that the search was conducted by a lone policeman in the presence of four unknown individuals, Judge Gabrielli concluded that the majority erred in assuming from the facts that both the arrestees and their property had "been conclusively and safely reduced to the complete control of the officer, as a matter of law." *Id.* at 455, 407 N.E.2d at 425, 429 N.Y.S.2d at 578 (Gabrielli, J., dissenting).

²²⁴ *Id.* at 454, 407 N.E.2d at 425, 429 N.Y.S.2d at 578 (Gabrielli, J., dissenting).

property clearly within the exclusive control of the police, purportedly on the basis of the incident to arrest exception.²²⁵ These decisions, it appears, by sanctioning an arbitrary standard of exigency predicated solely on contemporaneousness with the arrest, had subverted the express purpose of the fourth amendment.²²⁶ Also overruled, albeit implicitly, were prior decisions wherein the novel "maximum intrusion" test had been applied to validate warrantless searches of "particularized" property undertaken at or near

²²⁵ In the course of its decision, the *Belton* Court overruled *People v. De Santis*, 46 N.Y.2d 82, 385 N.E.2d 577, 412 N.Y.S.2d 838 (1978), *cert. denied*, 443 U.S. 912 (1979), and *People v. Darden*, 34 N.Y.2d 177, 313 N.E.2d 49, 356 N.Y.S.2d 582 (1974). In *De Santis*, the Court had upheld the warrantless search of a suitcase in a police substation, notwithstanding that the suitcase was under exclusive police control at the time of search and that it was known to be free from weapons or explosives. 46 N.Y.2d at 86, 385 N.E.2d at 578-79, 412 N.Y.S.2d at 840. The search was validated due to its "close nexus" to the time and place of the arrest, and not because the arrestee could gain access to the suitcase. *Id.* at 89, 385 N.E.2d at 580, 412 N.Y.S.2d at 842. Similarly, in *Darden*, the Court found no difficulty in sustaining the warrantless search of an attache case already in police custody since at the time of arrest, the defendant was in possession of the case. 34 N.Y.2d at 180, 313 N.E.2d at 51, 356 N.Y.S.2d at 585.

Notably, prior to *Belton*, it was unsettled in New York whether a search incident to an arrest had to be restricted to those items the defendant could have reached when stopped by the police, *see People v. Darden*, 34 N.Y.2d at 180, 313 N.E.2d at 51, 356 N.Y.S.2d at 585; *People v. Fitzpatrick*, 32 N.Y.2d 499, 508, 300 N.E.2d 139, 143, 346 N.Y.S.2d 793, 799, *cert. denied*, 414 U.S. 1033 (1973); *People v. Floyd*, 26 N.Y.2d 558, 563, 260 N.E.2d 815, 817, 312 N.Y.S.2d 193, 196 (1970) (dictum), or to those items that the defendant could have reached at the time the search was commenced, *see People v. Fields*, 45 N.Y.2d 986, 988-90, 385 N.E.2d 1040, 1040-41, 413 N.Y.S.2d 112, 112-13 (1978); *People v. Williams*, 37 N.Y.2d 206, 208, 333 N.E.2d 160, 160, 371 N.Y.S.2d 880, 881 (1975). In holding that "the critical inquiry focuses upon the extent to which the arrestee may gain access to the property," and that no warrantless search is permissible after an item is in the exclusive control of the police or after the defendant is neutralized, the *Belton* Court restricted lawful warrantless searches incident to arrest to those items the defendant could reach at the time the search is commenced. 50 N.Y.2d at 451, 407 N.E.2d at 422, 429 N.Y.S.2d at 576. At the very least, therefore, *Belton* overrules *Darden* and *Fitzpatrick* on this issue. *See Arkansas v. Sanders*, 442 U.S. 753, 763 (1979); *United States v. Chadwick*, 433 U.S. 1, 15 (1977).

²²⁶ It is settled that the reasonableness of warrantless searches is a function of exigency. *See Chimel v. California*, 395 U.S. 752, 762-63 (1969). The fact of contemporaneousness of search and arrest, as the Supreme Court has recently indicated, *see United States v. Chadwick*, 433 U.S. 1, 15 (1977), is not a determinant of exigency, but rather it is an element thereof. *See note 200 supra*. Indeed, as the Court noted in *Chadwick*, "warrantless searches of luggage or other property seized at the time of an arrest cannot be justified as an incident to that arrest if either the 'search is remote in time or place from the arrest,' or no exigency exists." 433 U.S. at 15; *see Arkansas v. Sanders*, 442 U.S. 753, 766 (1979). In *People v. De Santis*, 46 N.Y.2d 82, 385 N.E.2d 577, 412 N.Y.S.2d 838 (1978), *cert. denied*, 443 U.S. 912 (1979), and *People v. Darden*, 34 N.Y.2d 177, 313 N.E.2d 49, 356 N.Y.S.2d 582 (1974), however, the Court focused solely on the search's "close nexus" in time and place to the arrest, *see note 225 supra*, thereby rendering the proximate concurrence of search and arrest dispositive, and eroding the protection of the fourth amendment.

the time of arrest.²²⁷ Categorizing the search of property inaccessible to an arrestee as a less objectionable intrusion than either the arrest itself²²⁸ or than the posting of a guard while a search warrant was sought,²²⁹ the Court previously had sustained such searches. In the wake of *Belton's* conclusion that an arrestee does not forfeit his privacy interest in nonaccessible items upon arrest, it certainly appears that such result no longer would obtain.

By recognizing as dispositive the extent to which an arrestee may obtain access to the property searched, the decision in *Belton* appears to comport with prevailing Supreme Court authority.²³⁰

²²⁷ In *People v. Perel*, 34 N.Y.2d 462, 315 N.E.2d 452, 358 N.Y.S.2d 383 (1974), the Court upheld the search of the defendant's property, contained in a police envelope, while the defendant was under police control. *Id.* at 465, 315 N.E.2d at 454-55, 358 N.Y.S.2d at 386-87. The search was justified not on the ground that it was incident to the arrest, but because of the "maximum intrusion already effected by an arrest and detention pending arraignment." *Id.* at 467, 315 N.E.2d at 456, 358 N.Y.S.2d at 389. Similarly, in *People v. Clements*, 37 N.Y.2d 675, 339 N.E.2d 170, 376 N.Y.S.2d 480 (1975), *cert. denied*, 425 U.S. 911 (1976), the Court upheld the search of closed bureau drawers where both defendants were arrested and handcuffed in different rooms because obtaining a search warrant would have required placing a guard at the premises until the warrant was obtained. *Id.* at 680-81, 339 N.E.2d at 174, 376 N.Y.S.2d at 485-86; see *People v. De Santis*, 46 N.Y.2d 82, 87, 385 N.E.2d 577, 579, 412 N.Y.S.2d 838, 840 (1978), *cert. denied*, 443 U.S. 912 (1979) ("practical impetus" for warrantless searches is that arrests are major intrusions on privacy interests of arrestees).

²²⁸ *People v. Perel*, 34 N.Y.2d 462, 315 N.E.2d 452, 358 N.Y.S.2d 383 (1974). While acknowledging that an arrestee "under effective police control is hardly in a position to use a weapon or destroy evidence," *id.* at 467, 315 N.E.2d at 456, 358 N.Y.S.2d at 388, the *Perel* Court nevertheless held that this is "too simple an explanation," and that the search is reasonable solely because it is a lesser intrusion than the greater personal intrusion of the arrest. The Court stated:

Given the nature of the gross intrusion (sic) by detention of the person it is reasonable to conduct a less intrusive search of his person and the possessions he carried with him. If logic, to the minds of some, may not seem to compel the rule, history supports it and precedents justify it.

Id. at 467, 315 N.E.2d at 456, 358 N.Y.S.2d at 389. The Court, however, presents no authority which supports this contention. Although the genesis of the maximum intrusion principle is unclear, the Court in *People v. Clements* found support for it in Justice White's dissenting opinion in *Chimel v. California*. *People v. Clements*, 37 N.Y.2d 675, 681 n.3, 339 N.E.2d 170, 174 n.3, 376 N.Y.S.2d 480, 486 n.3 (1975), *cert. denied*, 425 U.S. 911 (1976) (citing *Chimel v. California*, 395 U.S. 752, 775 n.5 (1969) (White, J., dissenting)).

²²⁹ *People v. Clements*, 37 N.Y.2d 675, 680, 339 N.E.2d 170, 173, 376 N.Y.S.2d 480, 485 (1975), *cert. denied*, 425 U.S. 911 (1976); see note 228 *supra*. One commentator has noted that, frequently, where the incident to arrest exception is employed, the exigency purportedly justifying the search has been "unnecessarily created" by the arresting officers. 2 W. LAFAYE, *supra* note 201, at 412. Professor LaFave states, "while it is true that the police may not be in a position to go for a search warrant *after* they have tipped their hand by making an arrest, this does not explain why it would not often be possible to avoid those 'exigent circumstances' by simply obtaining a search warrant *before* the arrest is made." *Id.*

²³⁰ See *Arkansas v. Sanders*, 442 U.S. 753, 766 (1979); *United States v. Chadwick*, 433

Indeed, the Supreme Court recently has reiterated that where the property to be searched has been reduced to the exclusive control of the police, thus eliminating the possibility that it could be reacquired or destroyed by the arrestee or a third party prior to the time required to obtain a search warrant, the exigent circumstances which would have justified a warrantless search no longer exist.²³¹ Such reasoning, followed in *Belton*, which recognizes the legitimacy of an incident to arrest search only where it is demonstrated that at the time of the intrusion the safety of the arresting officers or the continued viability of evidence were *realistically* implicated, seems to best preserve the sanctity of the constitutional prohibition of unreasonable searches.²³²

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U.S. 1, 15 (1977); *Chimel v. California*, 395 U.S. 752, 763 (1969).

²³¹ *Arkansas v. Sanders*, 442 U.S. 753, 755 (1979). In *Sanders*, the Supreme Court held unlawful the warrantless search of a suitcase seized from the trunk of a taxi where it was clear that the police were in control of the car and its occupants. *Id.* The Court, conceding that it granted review to rectify misinterpretations of its decision in *United States v. Chadwick*, 433 U.S. 1 (1977), held that where the police have exclusive control of the article to be searched, the search of the property should await the issuance of a warrant. 442 U.S. at 766.

²³² One method which effectuates the purpose of fourth amendment protection is the system of telephonic search warrants. Notably, in the federal system, a federal magistrate is empowered to issue a warrant "based upon sworn oral testimony communicated by telephone or other appropriate means." FED. R. CRIM. P. 41(c)(2). The rule was promulgated "for the purpose of enabling warrants to be procured as expeditiously as possible." *United States v. Strother*, 578 F.2d 397, 400 n.3 (D.C. Cir. 1978). To successfully suppress evidence obtained from the search, under the federal rule, there must be a showing of "bad faith" on the part of the police officer in procuring the warrant. FED. R. CRIM. P. 41(c)(2)(G).

At least two state jurisdictions have telephonic search warrant statutes. ARIZ. REV. STAT. ANN. §§ 13-3914(c), 13-3915(c) (1978); CAL. PENAL CODE § 1528(b) (West Supp. 1980). See generally Marek, *Telephonic Search Warrants: A New Equation for Exigent Circumstances*, 27 CLEV. ST. L. REV. 35 (1978). It is suggested that were such procedure to be legislatively adopted in New York, it would permit the prompt discovery and seizure of evidence, while preserving the arrestee's legitimate expectation of privacy in his property.